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9 October 2019

Ex Parte

Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Expanding Flexible Use of the 3.7 to 4.2 GHz Band; GN Docket No. 18-122

Dear Ms. Dortch:

On 7 October 2019, James Frownfelter, Chairman and CEO of ABS Global Ltd. (ABS), and undersigned counsel met with General Counsel Tom Johnson, Michael Carlson, Deborah Broderson, William Richardson, and David Horowitz of the Office of General Counsel, and Matthew Pearl of the Wireless Telecommunications Bureau, on behalf of the Small Satellite Operators (SSOs).

We described the SSOs' investments in the U.S. C-band and the importance of their U.S. authorizations to their global satellite businesses. We explained that each of the SSOs has designed and launched a satellite to serve the U.S. market, obtained authorizations to do so across the entire 500 megahertz of the C-band, and maintained those authorizations in good standing.

We expressed support for repurposing 300 megahertz of C-band spectrum, suggesting it could be done quickly through the use of compression technology, and for mandating that a substantial percentage of auction proceeds go to the U.S. Treasury. In addition, we expressed support for incenting earth station operators and for allocating the remaining proceeds among all eight satellite operators with FCC authorizations to serve the United States in the C-band. Finally, we said we would support a private auction conducted by the C-Band Alliance (CBA), provided that it was governed by FCC rules that ensured an open and transparent process, and a fair and equitable distribution of the proceeds among all eight satellite operators.

We then responded to the argument raised by the CBA and Verizon that Section 316 of the Communications Act would allow the Commission to eliminate repurposed spectrum from the authorizations of the SSOs, but not CBA members.[1] While Section 316 authorizes the Commission to "modif[y]" a "station license,"[2] it does not permit the Commission to effect "a fundamental change" to license terms.[3] A revocation of 60% of a licensee's spectrum in a band

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1 *See* Letter from William H. Johnson, Senior Vice President, AGC – Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 1-2 (filed Sept. 26, 2019) (Verizon Letter); Letter from Jennifer D. Hindin, Counsel for the C-Band Alliance, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 1 (filed Sept. 24, 2019).

2 47 U.S.C. § 316(a).

3 *Cmty. Television, Inc. v. FCC*, 216 F.3d 1133, 1141 (D.C. Cir. 2000).

would effect a fundamental change to the terms of the license to operate in that band.[4] Whether the CBA has allowed the licensee to participate in its alliance has nothing to do with it.

The CBA and Verizon also suggest that the limits on the FCC's Section 316 authority require "past revenues" or "existing service," but this argument belies the text of the statute. Both the Commission's Section 316 power, and the restrictions on that power, are directed to a "station license"—which is an instrument that confers authority to use spectrum and thus defines the wireless licensee's spectrum use rights.[5] Because the Commission may not make fundamental changes to *licenses*, the way the rights *are being used* at a particular point in time is not relevant. Whether a licensee is using its spectrum rights now or has invested to do so in the future (as long as its FCC authorization is in good standing), its *rights* are no less changed if they are confiscated. Nothing in Section 316 or the cases interpreting the provision suggest that the Commission may "confiscate" spectrum use rights before service begins, but only "modify" them thereafter.

Importantly, even if it were the case that "fundamental changes" require an impact to existing levels of service, Section 316 would allow the Commission to take away CBA members' spectrum as well. As Verizon explains in its letter, CBA members can repack all existing customers in much less spectrum, and thus their existing service would not be affected by a reallocation.[6] While Verizon uses Eutelsat to illustrate the point, the same is true for Intelsat, SES and Telesat.[7] Of course, by eliminating spectrum from their C-band authorizations, the Commission would allow these operators to provide only a fraction of the service for which they were licensed, and thus would effect a "fundamental change" to the terms of their authorizations. But that is no less true for the SSOs than it is for the other satellite operators affected by this proceeding.

None of the authorities cited by Verizon is to the contrary. While the Commission has invoked Section 316 to shift licensees from one channel to another,[8] to cure defects in the application process,[9] and to expand the spectrum use rights available to the licensee,[10] it has never pursued

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4 *See MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 228-29 (1994).

5 *See* 47 U.S.C. § 153(49).

6 *See* Verizon Letter at 2.

7 *See* Letter from Colby May, Counsel to Trinity Broadcasting, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 6-7 (filed May 16, 2019); *see generally* Letter from Henry Gola, Counsel for the C-Band Alliance, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122, at 1 (filed Apr. 3, 2019) (describing CBA members' "binding commitment" to transition customers to remaining spectrum).

8 *See Cmty. Television*, 216 F.3d at 1140-41; *see also Peoples' Broad. Co. v. United States*, 209 F.2d 286, 287 (D.C. Cir. 1953).

9 *See Cal. Metro Mobile Commc'ns v. FCC*, 365 F.3d 38, 45-46 (D.C. Cir. 2004) (affirming the Commission's removal from a walkie-talkie license of a frequency that had not been properly coordinated as required under FCC rules).

10 *See Cmty. Television*, 216 F.3d at 1140-41; *see also Establishing Rules and Policies for the use of Spectrum for Mobile Satellite Services in the Upper and Lower L-band*, Report and Order, 17 FCC Rcd. 2704 ¶¶ 1, 3 (2002) (allowing an MSS licensee to swap unusable spectrum for new spectrum that could actually be used to provide international service).

Section 316 "modifications" that leave the operator able to provide only a small fraction of the service for which it was licensed.[11] Importantly, a past revenue requirement would also conflict with recent precedent governing the repurposing of spectrum for flexible use. In previous proceedings, the Commission has consistently looked to whether an incumbent holds a valid spectrum license—and has explicitly declined to exclude licensees who had not yet commenced commercial service.[12] For example, when expanding terrestrial use of the AWS-4 band, the Commission assigned new Part 27 licenses to incumbent MSS licensees that had not made any use of their ancillary terrestrial component authorizations.[13] And in the Spectrum Frontiers proceeding, the Commission granted flexible use rights to co-primary incumbent fixed-service licensees, even though many of those incumbents had not deployed facilities, let alone rolled out revenue-generating services.[14]

We also explained why attempting to use Section 316 to confiscate a large portion of the spectrum licensed to satellite operators would be terrible spectrum policy. Communications companies make long-term wireless investments because they know they can rely on FCC licenses. If the FCC decides that Section 316 allows it to take away licensed spectrum, without any compensation, even after significant amounts of network investment already have taken place, it will fundamentally change not just the terms of the authorizations affected—but what it means to hold an FCC license. Moreover, focusing on whether a spectrum licensee has in the past had U.S. customers or revenues, rather than whether the licensee has a valid authorization, risks rewarding licensees who long ago recouped their initial investments and stranding licensees who have just made investments in new networks. It would also pick winners and losers in the marketplace by tilting the playing field in favor of incumbents and against new entrants.

Finally, we agreed that only the eight operators with satellites that can uplink/downlink in the continental United States (CONUS) should be eligible to relinquish their spectrum use rights. But we explained that satellites should not be excluded simply because they do not cover the *entire* CONUS, contrary to the CBA's recent suggestion.[15] As an initial matter, the CBA's criterion would exclude approximately a third of CBA members' own satellites. Moreover, satellites with partial CONUS coverage will be heavily affected by the repurposing, especially because terrestrial operators plan to deploy 5G virtually everywhere in the country.[16]

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[11] *See* Comments of the Small Satellite Operators (ABS Global Ltd., Hispasat S.A. and Claro S.A.), GN Docket No. 18-122, at 27-30 (filed July 3, 2019).

[12] *See id.* at 13-15 (discussing precedents).

[13] *Service Rules for Advanced Wireless Servs. in the 2000-2020 MHz & 2180-2200 MHz Bands*, Notice of Proposed Rulemaking, 27 FCC Rcd. 3561, 3566 ¶ 8 (2012).

[14] *Use of Spectrum Bands Above 24 GHz for Mobile Radio Servs.*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 8014, 8031, 8901-92 ¶¶ 41-42, 219-20 (2016).

[15] *See* Comments of the C-Band Alliance, GN Docket No. 18-122, at 2 (filed July 3, 2019).

[16] *See*, *e.g.*, Reply Comments of the Small Satellite Operators (ABS Global Ltd., Hispasat S.A. and Claro S.A.), GN Docket No. 18-122, at iii-iv (filed July 18, 2019).

Please let us know if you have any questions or need any further information.

Sincerely,

Scott Blake Harris
Shiva Goel
Jason Neal
Counsel to the Small Satellite Operators

cc: meeting attendees